

Filed 11/17/16 In re Isaiah CA2/3

On remand from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ISAAH W., a Person
Coming Under the Juvenile
Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ASHLEE R.,

Defendant and Appellant.

B250231

(Los Angeles County
Super. Ct. No. CK91018)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Judge. Reversed and remanded with instructions.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

We come to this case on remand from the California Supreme Court, following its reversal of our previous decision. Ashlee R. (Mother) appealed from the judgment terminating her parental rights to her son, Isaiah W. She contended that the juvenile court erred in finding that it had no reason to know Isaiah was Indian and in failing to give notice under the Indian Child Welfare Act (ICWA). We previously held that Mother failed to timely appeal the juvenile court's order regarding its ICWA findings. The Supreme Court reversed, holding that a parent may challenge a finding of ICWA's inapplicability in an appeal from a subsequent order, even where the parent failed to raise the challenge to the initial order addressing ICWA. (*In re Isaiah W.* (2016) 1 Cal.5th 1.) On remand, we address the remaining issue of whether ICWA notice requirements were triggered under the facts of this case.

Based on our review of the record, we conclude that ICWA notice should have been given because the juvenile court had notice of the child's possible Blackfoot and Cherokee ancestry. The judgment terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order the Los Angeles Department of Children and Family Services (DCFS) to comply with inquiry and notice provisions of ICWA. If after receiving proper notice, no tribe indicates Isaiah is an Indian child within the meaning of ICWA, the juvenile court shall reinstate the order terminating parental rights.

FACTS AND PROCEDURAL BACKGROUND

In November 2011, Isaiah was born with a positive toxicology for marijuana and exhibited withdrawal symptoms. DCFS filed a petition alleging that Mother's and Father's illicit drug use placed Isaiah at risk of harm.

On December 8, 2011, Mother signed a parental notification of Indian status indicating she had Cherokee heritage through the maternal grandmother and Blackfoot heritage through the maternal grandfather. Mother identified her grandmother and great grandmother as her family members who had Indian heritage on her mother's and father's sides of the family. At the detention hearing, Mother told the court: "I have Indian in my family. [W]hen my grandma was alive, she used to tell me she was a part Cherokee, if I'm not mistaken." Mother stated that none of her family members were registered as members of Indian tribes.

At the detention hearing, the juvenile court removed Isaiah from his parents' care and ordered reunification services for them. The court found that it had "no reason to know the child would fall under the Indian Child Welfare Act," but ordered DCFS to investigate further and report its findings to the court.

DCFS interviewed maternal relatives and reported to the court that maternal grandmother may have had Blackfoot ancestry and maternal great-great-grandmother may have been part of a Cherokee tribe. DCFS summarized: "[maternal grandmother's] father, Jessie [T.] may have had Blackfoot ancestry but no information is obtained as [maternal grandmother] and her siblings never met him and have no further information as to Jessie and do not know if he was registered. Also Willie Mae [J.] is [maternal grandmother]'s grandmother . . . was possibly Cherokee but unknown if registered."

At the jurisdictional and dispositional hearing on January 20, 2012, the juvenile court reviewed DCFS's report and concluded that there was no "reason to know" that Isaiah was "an Indian child as defined under ICWA." Accordingly, the court did not order that DCFS provide notice to any tribe or the Bureau of Indian Affairs. Neither Mother nor Father objected or argued that the ICWA was applicable. The court adjudged Isaiah a dependent and ordered him placed in foster care. The court ordered the parents to participate in counseling and drug testing. Mother did not appeal that order.

Mother did not attend her scheduled drug tests or drug treatment program. Although she visited with Isaiah on a weekly basis, she never remained for the full two hours scheduled for the visits. Father only visited Isaiah two or three times. On September 12, 2012, the juvenile court terminated the parents' reunification services and set a hearing on the termination of parental rights.

On November 5, 2012, DCFS placed Isaiah with a prospective adoptive family. On April 10, 2013, the juvenile court terminated Mother's and Father's parental rights. At the hearing, the court repeated its prior finding that there was no reason to know Isaiah was an Indian child. On June 5, 2013, Mother appealed from the termination of parental rights, arguing that the court erred in concluding that ICWA was inapplicable.

DISCUSSION

As explained above, the sole issue on remand is whether ICWA notice requirements were triggered. "We review the trial court's findings . . . whether ICWA applies to the proceedings for substantial evidence." (*In re D.N.* (2013) 218 Cal.App.4th 1246, 1251.)

Both the California and federal ICWA statutes mandate that the social welfare agency notify the child's tribe "[w]hen a dependency court has reason to know the proceeding involves an Indian child" (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383; Welf. & Inst. Code, §224.2.) " 'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).) California Rules of Court, rule 5.481(a)(5) states: "The circumstances that may provide reason to know the child is an Indian child include the following: [¶] (A) The child or a person having an interest in the child, including an Indian tribe, an Indian organization, an officer of the court, a public or private agency, or a member of the child's extended family, informs or otherwise provides information suggesting that the child is an Indian child to the court, the county welfare agency, the probation department, the licensed adoption agency or adoption service provider, the investigator, the petitioner, or any appointed guardian or conservator." "Where there is reason to believe a dependent child may be an Indian child, defective ICWA notice is 'usually prejudicial' [citation], resulting in reversal and remand to the juvenile court so proper notice can be given." (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 850.)

Here, the court's finding that ICWA notice requirements were not triggered is not supported by substantial evidence. Mother and Mother's family members stated that Isaiah may have Cherokee and Blackfoot heritage, and named particular family members who were thought to have been Indian. This alone was enough to invoke ICWA notice requirements. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167 [the father's claim of Indian heritage on

the ICWA-020 form triggered the social services agency's duty to engage in further inquiry].) "The Indian status of the child need not be certain to invoke the notice requirement. [Citation.]" (*In re Desiree F.* (2003) 83 Cal.App.4th 460, 471.)

The fact that no living family member was enrolled in a tribe and that the enrollment status of deceased family was unknown does not alter our analysis. "Enrollment is not required . . . to be considered a member of a tribe; many tribes do not have written rolls. [Citations.] While enrollment can be one means of establishing membership, it is not the only means, nor is it determinative. [Citation.] . . . Recently enacted Welfare and Institution Code section 360.6 codifies the state Legislature's intent that the ICWA applies to children who are *eligible* for membership in an Indian tribe, even if not enrolled. California Rules of Court, rule 1439(g)(2) also specifically provides that '[i]nformation that the child is not enrolled in the tribe is not determinative of status as an Indian child.'" (*In re Desiree F.*, *supra*, 83 Cal.App.4th at pp. 470-471.) "Moreover, a child may qualify as an Indian child within the meaning of the ICWA even if neither of the child's parents is enrolled in the tribe." (*Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 254.)

"The decision whether a child is a member of, or eligible for membership in, the tribe is the sole province of the tribe." (*In re Jack C.* (2011) 192 Cal.App.4th 967, 980; *Santa Clara Pueblo v. Martinez* (1978) 436 U.S. 49, 72 fn. 32 [The United States Supreme Court stated that a "tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence as an independent political community."].) In dependency proceedings, "the determination whether the child is an Indian child within the meaning of ICWA depends in large part on the tribe's

membership criteria. Because of differences in tribal membership criteria and enrollment procedures, whether a child is an Indian child is dependent on the singular facts of each case.” (*In re Jack C.*, at p. 979.) Thus, it is not for the court to make a finding as to the child’s or the parent’s status as a member of the tribe based on evidence that an extended family member is Indian.

Citing *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520, and *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538, DCFS states that a bare suggestion of Indian ancestry is insufficient to require notice and that there was insufficient evidence showing Isaiah’s Indian ancestry. The Courts of Appeal in those cases determined that ICWA notice requirements did not apply because the claim of Indian ancestry was too attenuated or uncertain. Notably, in *In re Jeremiah G.*, at page 1519, the father failed to provide his possible tribal affiliation and subsequently retracted his claim of Indian heritage. In *In re Shane G.* at page 1537, a relative informed the social worker that the child’s great-great-great grandmother was Comanche. In finding this information insufficient to trigger ICWA notice, the court noted that the “[m]ost significant” factor in its analysis was the evidence in the record that the Comanche tribe requires at least one-eighth Comanche heritage for membership in the tribe. (*Id.*, at pp. 1537, 1539.) The information before the court was that the child was 1/64th Comanche, and therefore could not have been a Comanche child. (*Id.*, at p. 1537.)

These cases are clearly distinguishable, as Mother has provided the name of the tribe in making her Indian heritage claim, has identified the particular biological ancestors with Indian heritage, and has been unequivocal in her claim of Indian heritage. In addition, unlike *In re Shane G.*, there is no information in this case that would definitively exclude Isaiah as a member of the Cherokee or Blackfoot¹ tribes.

Therefore, we conclude that the juvenile court's ICWA notice determination was not supported by substantial evidence, and the court failed to ensure compliance with ICWA. The termination order must be conditionally reversed for the purpose of determining compliance with the further inquiry and notice requirements. (See *In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385; *In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

¹ DCFS asserts that because there is no federally recognized tribe called Blackfoot in the federal registrar, the assertion that Isaiah's great grandfather might have had Blackfoot ancestry was insufficient to invoke ICWA notice requirements. However, "there is frequently confusion between the Blackfeet tribe, which is federally recognized, and the related Blackfoot tribe which is found in Canada and thus not entitled to notice of dependency proceedings. When Blackfoot heritage is claimed, part of the [DCFS]'s duty of inquiry is to clarify whether the parent is actually claiming Blackfoot or Blackfeet heritage so that it can discharge its additional duty to notice the relevant tribes." (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1198.)

DISPOSITION

The judgment terminating parental rights is conditionally reversed and the case is remanded to the juvenile court with directions to order DCFS to comply with inquiry and notice provisions of ICWA. If, after receiving proper notice, no tribe indicates Isaiah is an Indian child within the meaning of ICWA, the juvenile court shall reinstate the order terminating parental rights.

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STRATTON, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.